No. 14860

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

MICHAEL GLENN, a Minor, by and through his Guardian *ad Litem,* Ida Mae Glenn,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Appellee adopts the Jurisdictional Statement and Statement of the Case set forth in Appellant's Brief.

Question Presented.

The question presented for decision is whether the two-year statute of limitations for asserting tort claims against the United States should be tolled during the infancy of the plaintiff.

ARGUMENT.

I.

Section 2401 Provides That the Time Limitations on All Actions Against the Government Are Tolled During Legal Disability.

A. A provision for tolling the statute of limitations in actions against the government during the legal disability of the claimant was initially contained in 28 U. S. C. (1946 ed.) 41(20), derived from section 24(20) of the Judiciary Act of 1911, 36 Stat. 1093, and section 2 of the Tucker Act (1887), 24 Stat. 505. This section set forth a general six-year period of limitation for suits against the government, subject to the provision that said period of limitations was tolled during the disability of married women, minors, persons of unsound mind, and persons beyond the seas, and for a period of three years after the disability ceased. At the time of this enactment no tort claims were permitted against the United States, and the statute therefore, in express terms, applied only to contract actions against the government.

B. In 1946 Congress passed the Federal Tort Claims Act (Legislative Reorganization Act, Title IV, 60 Stat. 842) permitting tort claims against the Government, and provided therein a "statute of limitations" of one year for the assertion of such claims. (28 U. S. C. (1946 Ed.) 942.) No express reference was made in said legislation to the matter of tolling the period of limitations during legal disability, although the statute did provide that the United States should be liable "in the same manner and to the same extent as a private individual under like circumstances." (28 U. S. C. 2674.) We do not know why an express provision for tolling the statute

during legal disability was not included in the Act. Presumably Congress assumed that such a fundamental principle of fairness, deeply inbedded in Anglo-American jurisprudence (see *Sims v. Everhardt,* 102 U. S. 300, 309-310), would be given effect by the courts. (See argument under II, *infra.*) Nor do we know what sentiment arose in Congress during the two years following enactment of the statute for express inclusion of such a provision therein.

C. We do know, however, that as part of a general revision of the Judicial Code in 1948 Congress repealed both section 41(20) and section 942 of Title 28 of the United States Code and enacted a single new section, 28 U. S. C. 2401, which sets forth the time limitations for bringing actions against the Government and provides for the tolling of such time limitations during periods of legal disability of the claimant. This new section does not consist merely of the old sections 41(20) and 942 placed together in one location. On the contrary, section 2401 contains new language which differs in material respects from the language of the old sections. Subsection (a) of the new section provides for a general six-year statute of limitations on all actions brought against the government, without restrictions as to the type of action, whether contract or tort, and said subsection further provides that persons under a legal disability may assert their action within three years after the disability ceases —again without restriction as to the type of action, whether contract or tort. Subsection (b) of the new section provides a two-year period of limitations for filing suit on tort claims exceeding $1,000 and for making written claim to the appropriate federal agency on tort claims not exceeding $1,000. (In 1949 the section was

amended to increase the period of limitations on tort claims from one year to two years. (63 Stats. 62.))

D. Did Congress by the enactment of this new section make express provision for tolling the statute of limitations in favor of persons under a legal disability as to *all* actions against the government, both contract and tort? The meaning of the language of the section indicates this was done, and of course "the words by which the legislature undertook to give expression to its wishes" offer the best evidence of what was intended by the enactment. (*United States v. American Trucking Ass'ns,* 310 U. S. 534, 543-544.)

(1) The second sentence of subsection (a) of 2401 provides that *"the action* of *any person* under legal disability or beyond the seas at the time *the claim* accrues may be commenced within three years after the disability ceases." (Emphasis added.) Nothing in this sentence or in the sentence which precedes it limits its application to contract actions. The plain meaning of the sentence is that it applies to *all* actions against the government whether contract or tort. This conclusion is reinforced by the fact that the phraseology of the old section 41(20), which did expressly limit the application of its disability provision to contract actions, was abandoned in the drafting of the new section, so that the provision as to disability in the new section refers to "the action of any person" without restriction as to the type or category of the action.

(2) Appellant contends that the application of the disability provision in the new section is confined to contract actions because the provision is placed in subsection (a) of 2401 while the period of limitation as to tort claims is covered in subsection (b). Analysis of subsection

(a), however, does not support Appellant's argument. Whatever the source of subsection (a) it is not, according to its terms, confined to contract actions. The first sentence of said subsection provides that *"Every civil action* commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." (Emphasis added.) "Every civil action" means every action, contract or tort. In this respect also the language of the section is materially different from the old section 41(20) which confined the six-year period of limitations to contract actions brought pursuant to that section.

Thus, subsection (a) of the new section provides for a general period of limitations on all actions against the government, contract or tort, of six years, and for a tolling of the limitation period *on all actions* in favor of persons under a legal disability until three years after the disability has been removed. Subsection (b) then specifically provides a shorter period of limitations for tort claims against the government, thereby setting up an exception to the general six-year limitation period of subsection (a). There is nothing, however, in the exception contained in subsection (b) which states in any way that the disability provision in the second sentence of subsection (a) does not apply to tort claims, and as an exception, subsection (b) should be limited to its terms. It must be kept in mind that these two subsections are merely paragraphs of a single section, enacted under a single heading, and said section and each part thereof should be construed and given effect as a unit, in preference to treating each subsection as a separate and distinct section, complete in itself, as Appellant in effect would do.

(3) Thus it appears that reasonably interpreted the language of section 2401 says in effect: There is a general six-year statute of limitations on all actions, contract or tort, brought against the government; the period of limitations on all actions, contract or tort, is tolled in favor of a person under a legal disability until 3 years after the disability is removed; provided, however, that as to tort claims asserted against the government the period of limitations shall be two years.

(4) This reasonable construction of the plain language of the statute is not contradicted by the Reviser's Notes upon which Appellant relies so heavily. These notes, which are set forth in full in the Memorandum of Decision of the District Court [R. 64-65], in effect simply point out the changes in language which have been made in section 2401 as compared to the old sections 41(20) and 942. In referring to such change of language, moreover, the Notes in two instances state "See Reviser's Note under section 2501 of this title." Section 2501 contains similar provisions with regard to the period of limitations on actions brought in the Court of Claims, and the Reviser's Notes under that section state in part:

> "The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic, and is eliminated by use of the general language substituted.
>
> "Words 'nor shall any of the said disabilities operate cumulatively' were omitted, in view of the elimination of the reference to specific disabilities. *Also, persons under legal disability could not sue, and their suits should not be barred until they become able to sue.*" (28 U. S. C. A. foll. 2405. Emphasis added.)

This quotation from the Reviser's Notes clearly enunciates a policy that suits by all persons not able to sue because of a legal disability should not be barred until they become able to sue. Since the Notes under section 2401 make specific reference to this statement, it appears that the same policy motivated the enactment of section 2401 and that section should be interpreted accordingly.

(5) Appellant points out that if the disability provision of section 2401 is held to apply to tort claims a claimant under a legal disability will be given a longer period after the removal of the disability in which to bring suit (3 years) than the initial period of limitations on tort actions (2 years). This is not sufficient grounds, however, for disregarding the express language of the section. The explanation would appear to be simply that Congress chose to utilize the same general disability clause for all actions, contract and tort. The omission to provide that the period of limitations should end two years after the removal of the disability with respect to tort actions may have been an oversight on the part of the drafters or it may reflect a policy of giving persons under a disability a somewhat longer period in which to bring their case after removal of the disability, but whatever the explanation the express provision of the statute should control.

II.

The Time Limitation of Section 2401(b) Is a "Statute of Limitations" Which Under Federal Law Is Tolled During Legal Disability.

A. The Federal Courts in a number of cases have held that statutes of limitations are ordinarily tolled during the time plaintiff is prevented from suing because of legal disability or fraud of the defendant, even in the absence of express provision to this effect. The same cases further hold, however, that if the time limit for bringing suit constitutes a "substantive condition" of the right created by the statute in which it is set forth, rather than a "statute of limitations," then suit must be brought within that time period without regard to legal disabilities or fraud. (*Sgambati v. United States,* 172 F. 2d 297; *Osbourne v. United States,* 164 F. 2d 767, 768; *Wahlgren v. Standard Oil Company,* 42 Fed. Supp. 992; *Kalil v. United States,* 107 Fed. Supp. 966; *Frabutt v. New York C. & St. L. R. Co.,* 84 Fed. Supp. 460; *Damiano v. Penn. R. Co.,* 161 F. 2d 534. See *Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253.) These cases, all cited in Appellant's Brief, include actions brought against the United States Government.

1. As indicated by the above cases a statute of limitations must be differentiated from a statute in which the time fixed forth for bringing the action is treated as an inherent part of the right created by the statute. As stated in 34 *Am. Jur.* 16:

> "A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within

> which that action may be commenced, *is not a statute of limitations.* It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right." (Emphasis added.)

In the above cited cases the time periods for bringing suit under the Federal Employers Liability Act and related statutes, to wit, the Jones Act, the Suits in Admiralty Act, the Public Vessels Act, were held to constitute, *not statutes of limitations* which would be tolled during legal disability or for fraud, but substantive conditions to the exercise of the rights created by the statutes, which are not affected by legal disabilities or fraud.

B. As distinguished from the Federal Employers Liability Act and related acts, referred to above, however, the period of limitations set forth in the Federal Tort Claims Act is a *statute of limitations* rather than a substantive condition. The time limitation provision of the Tort Claims Act when enacted was expressly entitled by its codifiers "Statute of Limitations" (28 U. S. C., 1946 ed., 942), and it has been designated a statute of limitations rather then a substantive condition in *Sweet v. United States,* 71 Fed. Supp. 863, 864, and in *Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869, at 873, wherein the court stated (p. 873):

> "As was well said by Judge Yankwich in *Sweet v. United States,* D. C., 71 F. Supp. 863, 864, answering the argument that the language of 410 (a) of the act incorporated the one year limitation on actions for tort of the California law: 'The sovereign having

> waived immunity, this clause, without anything else, might possibly be construed to mean that the state statute would apply. But the Congress specifically enacted section 420, 28 U. S. C. A. sec. 942, which the codifiers entitled *"Statute of Limitations."* . . . And we think it makes no difference that the limitation applicable to the action for death by wrongful act is held under state law to be a condition on the exercise of the right rather than a limitation on the remedy. This holding is based upon the narrow ground that the limitation is imposed by the statute creating the cause of action[2] and is, to say the best of it, technical and legalistic reasoning, which is not followed in all the states. ([2]It may be observed that the limitations in the Tort Claims Act is also imposed by the statute creating the cause of action; and *if importance is to be attached to this distinction,* it is a reasonable assumption that Congress intended the condition created by its own act to apply rather than one relating to the same subject matter contained in the State law.)" (Emphasis added.)

Thus, under the federal cases the Federal Tort Claims Act is to be differentiated from the Federal Employers Liability Act and related acts in that the time for bringing suit under the former is a statute of limitations and the time for bringing suit under the latter is a substantive condition. Therefore, the period of limitations is tolled during legal disability under the Tort Claims Act but not under the other acts named.

C. An important reason for this distinction between the Federal Tort Claims Act and the Federal Employers Liability Act and related statutes is indicated in the cases cited above holding the time limitations of the latter acts are substantive conditions rather than statutes of limita-

tions. These cases state as a basis for their holdings that said statutes created new rights unknown to the common law. This, however, is not true of the Federal Tort Claims Act. The substantive right made available to plaintiffs by that act is simply the old common law right of action for negligence. True, the sovereign could not be sued for negligence at common law, but this freedom from suit was merely an immunity on the part of the sovereign constituting a defense to the common law action. The common law right of suit for negligence continued to exist subject to a defense of immunity on the part of the sovereign. This defense could be waived by the sovereign and has in fact been waived by the United States through the Federal Tort Claims Act (*Cerri v. United States,* 80 Fed. Supp. 831 at 833; *Sweet v. United States,* 71 Fed. Supp. 863, 864), thereby leaving plaintiffs free to assert their basic common law cause of action. The Tort Claims Act does not create a new kind of action; it does not create a cause of action at all; it merely waives the government's defense of immunity to suit.

1. That the basic cause of action under the Tort XXXXXX Claims Act is a common law cause of action is made clear by the provision of the act that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." (28 U. S. C. 2674.) This clause, of course, does not mean that the statute of limitations of the State wherein the tort occurred is to apply to suits brought pursuant to the act, and in fact the courts have expressly held that the clause does not have that effect (*Maryland v. United States,* 165 F. 2d 869; *Sweet v. United States,* 71 Fed. Supp. 864), but the clause does in-

dicate that the cause of action which a plaintiff asserts against the government under the Tort Claims Act is simply the same common law cause of action that is asserted against private persons. (*United States v. Campbell,* 172 F. 2d 500 at 503; *Cerri v. United States,* 80 Fed. Supp. 831 at 833.)

D. Serious doubt has been cast upon the entire doctrine that the time limitations contained in the Federal Employers Liability Act and related statutes are unaffected by legal disability or fraud, and several exceptions have been made which are not consistent with the rule. (*Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253; *Osbourne v. United States,* 164 F. 2d 767; *Frabutt v. New York C. & St. L. R. Co.,* 84 Fed. Supp. 460; See *Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869.)

1. In the *Scarborough* case the court held the time period of the Federal Employers Liability Act was suspended during the period that plaintiff was prevented from bringing suit by the fraud of the defendant. In the *Osbourne* and *Frabutt* cases the court held the time limitation was suspended during the period that plaintiff was prevented by war from bringing suit.

2. These exceptions to the rule and doubts as to its ultimate soundness have grown out of the extreme inequity of the doctrine, its technical nature, and the failure of the courts following it to give full and serious consideration to the logic and fairness of its application. As stated by the Court of Appeals for the 4th circuit in *Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253, at 258-259, in reversing the District Court which had refused to suspend the time period of the Employers Liability Act

during the period plaintiff was prevented from bringing suit by the fraud of the defendant:

> "We have endeavored to set out fairly the law with which we are here concerned, as it has been stated in the cases decided by the courts. If dicta be considered, the weight of such primary authority appears to favor the view expressed by the District Court. In none of these cases, does the opinion fairly face, with an adequate discussion of the question on principle, the precise problem now before us. The cases cited as favoring the appellee based their holdings on *the narrow technical distinction between the two types of statutes of limitations* and then state baldly that, by virtue of this legalistic distinction, fraud does not toll the running of a statute of limitations which is of the substantive type. Under these circumstances, we do not consider ourselves bound by this seeming weight of judicial authority. We, accordingly, feel free to decide this case on principle. . . .
>
> "The decisions in the *Osbourne* and *Frabutt* cases, *supra,* show clearly that *there is a chink in the supposedly impregnable armor of the substantive time limitation of the Act. If, as those cases cited, there is one exception (war), surely the infinite variety of human experience will disclose others. Those cases demonstrate that a claim under the Act is not a legal child born with a life span of three years, whose life must then expire, absolutely, for all purposes and under all circumstances.* True it is that war physically prevents access to the courts, however anxious a litigant may be to bring suit. Fraud, however, as in the instant case, may be equally as effective in preventing one from seasonably suing on his claim. . . .
>
> "Judge Frank in the *Osbourne* case and Judge Parker in the *Burkhardt* case [*Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869], *supra,*

have shown that *the distinction between a remedial statute of limitations and a substantive statute of limitations is by no means so rock-ribbed or so hard and fast as many writers and judges would have us believe.* Each type of statute, after all, still falls into the category of a statute of limitations. And this is none the less true even though we call a remedial statute a pure statute of limitations and then designate the substantive type as a condition of the very right of recovery. There is no inherent magic in these words." (Emphasis added.)

3. According to the above quotation the time period for bringing an action, whether it be a true statute of limitations or a substantive condition, should be suspended during the period that plaintiff is prevented from bringing suit without fault on his part. Surely infancy may offer as effective a bar to suit as fraud on the part of defendant or the exigencies of war. An infant is legally barred by reason of his infancy from bringing suit. Appellant casually suggests that the infant may sue by next of friend. But he may have no next of friend. The rule contended for by Appellant in this case will be applicable to all infants in all situations. It will apply to a new born baby whose parents are dead, to children of tender years who are abandoned, to children whose parents are too ignorant and uninformed to protect the rights of their children. It will apply also to insane persons without friends or kin confined in mental institutions. In such situations the person under disability is as effectively prevented from bringing suit as a person who is held a prisoner of war or who is misled by misrepresentations. To bar such per-

sons permanently from bringing suit before termination of their disability is discrimination so shocking that such an intention should not be attributed to Congress if it can reasonably be avoided.

4. In the present case the following facts are all undisputed: Appellee is a colored boy who suffered alleged injuries at the time of his birth, December 5, 1949, in a naval hospital in Seattle, Washington. [R. 18-20, 52, 54.] His father was in the armed forces at the time and shortly after appellee's birth was sent to Korea where he was killed in action. [R. 73.] His mother who was 22 years old at the time of his birth had attended school only through the seventh grade. (Deposition of appellee's mother, Ida Mae Glenn, taken by Appellant Nov. 22, 1954, pp. 3, 6, not included in Record because of stipulation for judgment without trial.) Under these circumstances certainly it may be reasonably said that this boy could not effectively bring suit for his injuries within two years after the occurrence of the alleged injuries. The District Court expressly found that appellee is a person under a legal disability by reason of his minority [R. 73] and that his is not barred from bringing the action by the two-year period of section 2401(b). [R. 74.] Under the principles enunciated in the *Scarborough* case the trial court at least should have discretion to find that, by reason of his extreme infancy and the other circumstances of the case, plaintiff was in effect prevented from bringing suit within the statutory period without fault on his part and that the period of limitations

was therefore tolled. So long as it has a reasonable basis in fact this exercise of discretion should not be disturbed by an appellate court.

For the foregoing reasons it is respectfully submitted that the judgment appealed from should be affirmed.

Respectfully submitted,

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